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ICAC
Independent Commission
Against Corruption
SOUTH AUSTRALIA

15 December 2021

Crime and Public Integrity Policy Committee
Parliament House
North Terrace
ADELAIDE SA 5000

By email: CPIP@parliament.sa.gov.au

Dear Committee Members

Report of the Select Committee on Damage, Harm or Adverse Outcomes resulting from ICAC Investigations

On 30 November 2021 a report by the *Select Committee on Damage, Harm or Adverse Outcomes resulting from ICAC investigations* was tabled in the Legislative Council.

That report makes recommendations which could impact upon the functions of the Commission and the operation of the *Independent Commission Against Corruption Act 2012* (SA)(**the ICAC Act**).

It is not my practice to comment on recommendations of this type before a formal process of consultation has begun. However, as you would be aware, I was not consulted on the terms of the *Independent Commissioner Against Corruption (CPIPC Recommendations) Amendment Bill 2021* (SA). I also understand that none of the other integrity bodies whose functions were significantly affected by those amendments was consulted, including the South Australia Police and the Ombudsman.

For the reasons I set out in my recent report under s 42 of the ICAC Act, *An examination of the changes effected by the recent amendments to the Independent Commission Against Corruption Act 2012* (SA), I consider those amendments have narrowed the capacity of the public integrity scheme in South Australia to identify, deal with and prevent corruption. (I have **attached** a copy of the s 42 report to this letter for your ease of reference.)

I note that this is a conclusion that has also been reached by others. In its briefing paper on the ICAC Act amendments *The Centre for Public Integrity* came to the following conclusion:

> 17. The modifications made by the Independent Commissioner Against Corruption (CPIPC Recommendations) Amendment Bill 2021 (SA) to the powers and functions conferred upon the ICAC by the Independent Commissioner Against Corruption Act 2012 (SA) are inarguably substantial. In addition, some of them appear to have no basis in the CPIPC Report.

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> 18. The narrowed definitions of 'misconduct' and 'corruption', as well as the elimination of the ICAC's powers to undertake own-motion investigations, refer matters directly for prosecution, make public statements, and report appropriately constitute a significant reduction in the powers available to pursue corruption and misconduct. If unremedied, the legislation risks having a chilling effect on the ability of the relevant authorities to pursue issues of corruption and misconduct in South Australia.[1]

Accordingly, I have decided to make some observations on the recommendations of the Select Committee at this early stage to ensure my views are known.

The Select Committee's inquiry

I make two preliminary observations. The rules of procedural fairness apply to bodies conducting inquiries and making recommendations like the Select Committee. Those rules are designed to promote a situation where opinions expressed and findings and recommendations made emanate from a body free of bias and are based on cogent evidence and arguments that have been put to those whose interests they affect. Whether or not the rules apply to Parliamentary Committees, compliance with them is an important means by which fair and credible outcomes are reached.

I shall not pause to enumerate what I see as departures from those rules, because my purpose is to deal with the recommendations. However, my submission is that the fruits of the Committee's work need to be evaluated bearing in mind that there was a want of procedural fairness.

Furthermore, I make the general point that the manner in which whistleblowers and anti-corruption investigators were treated within the hearings is likely to have an impact on the readiness of whistleblowers to come forward in the future, and on the future preparedness of investigators to take up the important role of investigating corruption. Scrutiny of anti-corruption agencies is important. But it can and should be done with fairness so that the negative consequences which appear to me to have flowed from the treatment of witnesses in the Committee hearings are avoided.

The Select Committee's description of ICAC Act amendments

On pages 9 to 12 of its report the Select Committee describes the effect of the recent amendments to the ICAC Act.

The description of those amendments by the Select Committee is wrong in a number of respects.

I have set out these errors below because I think it is important that this Committee and the community have a clear understanding of the effect of the ICAC Act amendments.

On page 9 of the report the Select Committee says that the amendments in the Bill "arose from 17 recommendations made by the Crime and Public Integrity Policy Committee which was tabled in Parliament in December 2020".

I dealt with the suggestion the amendments arose from the Policy Committee's recommendations on page 4 of my s 42 report where I said:

> …the suggestion is misleading. The most significant changes made to the integrity scheme were not dealt with in the CPIPC's report and, in some respects, are contrary to the tenor of its recommendations. This is a view held not only by me. A recent assessment of the amending Act by the *Centre for Public Integrity* found that many of the changes made by the amending Act "appear to have no basis" in the CPIPC report.

[1] The Centre for Public Integrity, *Briefing Paper: The Independent Commissioner Against Corruption (CPIPC Recommendations) Amendment Bill 2021 (SA): key modifications to the jurisdiction and powers of the Independent Commissioner Against Corruption Act 2012 (SA)*, October 2021, https://publicintegrity.org.au/wp-content/uploads/2021/10/Briefing-paper-SA-ICAC-changes-05.10.21-1.pdf

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On page 10 of the Select Committee report it is said that "the (amended) definitions of corruption and maladministration are consistent with those already in the ICAC and Ombudsman's Act" and "the definitions have not changed but the agency responsible for investigating each has changed".

This is plainly wrong.

As I explain on pages 5 to 6 of my s 42 report, significant changes have been made to the definition of "corruption", reducing its ambit.

On page 12 the Select Committee report is stated:

> Under a new section 54 a person under investigation by the ICAC and the Ombudsman can access legal assistance. The only exclusion modifying Legal Bulletin no. 5 is that the person is required to re-pay the legal fees if they are subsequently found guilty of an indictable offence.

The reference to s 54 in the above should, I think, be a reference to s 59A.

More significantly, the paragraph incorrectly describes the effect of this aspect of the amendments in two ways.

First, it is not correct to say that the right to payment of legal costs is a right enjoyed by every person investigated by ICAC. That right is not conferred on non-public officers. It is conferred only on a limited class of public officers, being Members of Parliament, Ministers, Government Board Appointees and Government employees as defined.

Second, as I explain on pages 9 to 10 of my s 42 report, such persons are eligible for the reimbursement of legal costs unless convicted for "an indictable offence that *constitutes corruption in public administration* as a result of [an ICAC investigation]".[2]

Accordingly, a public officer convicted for a summary offence or an indictable offence that does *not* fall within the new and narrower definition of corruption in public administration in the ICAC Act will retain the right to have his or her legal costs paid from public funds.

For example, a public officer who falls within one of the discrete categories described above, could be convicted (either by verdict or as a result of a plea of guilty) of theft, deception or dishonestly dealing with documents and retain the right to have his or her legal expenses paid, as those offences were removed from the definition of "corruption in public administration" by the amendments.

Legal Bulletin 5 precluded the repayment of costs where a "material adverse finding" was made against the public officer. Had this criteria been adopted in the amendments, a conviction for *any* offence would preclude the repayment of costs.

As I explain on page 10 of my s 42 report, I am troubled by the prospect that these changes may influence the conduct of criminal prosecutions.

The recommendations of the Committee

I address each recommendation of the Committee in turn.

[2] ICAC Act Sch 5 cl 3(a)

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Recommendation 8.1

Recommendation 8.1 of the Select Committee is as follows:

> The Committee recommends that a judicial inquiry is established, appointing an interstate retired judicial officer or similar, and assisting counsel, to inquire into the handling of the PIR18/E1725 complaint and the handling of police complaints and compliance with the [*Police Complaints and Discipline Act 2016* (SA)] in general.

Throughout the proceedings of the Select Committee this matter been referred to as the Fuller/Lawton complaint.

I will not express my view about whether a further review of this matter is warranted.

I am aware that my former Deputy Commissioner, Mr Michael Riches, made a detailed submission about this matter to the Select Committee explaining what was done in relation to the complaint to the Office for Public Integrity and denying that it had any validity, since the dispute was correctly adjudged both by police and a senior prosecutor as a civil matter. This submission is not dealt with or even mentioned in the report.

I suggest that Mr Riches' submission be considered before a decision is made to expend more public resources conducting a further review of this matter. The matter has already been subjected to a number of reviews, all of which concluded that the complaint was unjustified.

Recommendation 8.2

Recommendation 8.2 of the Select Committee is as follows:

> The Committee recommends that the Office of the Independent Inspector investigates and considers making recommendations to the Attorney-General that the parties (and/or families) subject to the adverse outcomes outlined in this report to be (*sic*) reimbursed legal fees and associated costs, with other compensation to be considered. Any matters that are to be considered before the Coroners Court should also be included.

I do not wish to make any comment on this recommendation. How the Inspector decides to exercise his or her powers is obviously a matter for the Inspector.

If the Inspector does decide to review any of the matters that were considered by the Select Committee I would suggest that the Inspector consider all the statements which have been made about those matters during the Select Committee hearings and during the debate preceding the ICAC Act amendments, as the Select Committee's report refers only to evidence and submissions which favour such a compensatory regime. If the Inspector considers that any of those statements were incorrect or caused unfair prejudice and reputational damage to any persons, including SA Police officers who conducted anti-corruption investigations, I would suggest consideration be given to the Inspector making a public report about those matters.

Recommendation 8.3

Recommendation 8.3 of the Select Committee is as follows:

> The Committee recommends that the Office of Public Integrity (*sic*) investigate the circumstances surrounding the search of Chief Superintendent Barr's home and the powers exercised by SAPOL in the seizure of his personal belongings on the day of his suicide in October 2019.

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As is clear from the terms of the ICAC Act, the Office for Public Integrity has no investigative powers or functions. The former Commissioner the Hon Bruce Lander QC also made this clear on at least three occasions in his evidence before the Select Committee.[3]

On the wider issue, I emphasise, as was set out by Mr Lander in his submission, that any such search was not connected with any ICAC investigation and the search was not conducted at the request of, or with the involvement or knowledge of any officers of the ICAC.

Recommendation 8.4

Recommendation 8.4 of the Select Committee is as follows:

> The Committee recommends that the Crime and Public Integrity Policy Committee review section 67 of the Summary Offences Act and section 31 of the ICAC Act to consider reforms to the application and issuing of General Search Warrants and to consider the introduction of contestable search warrants.

It is not clear to me from the Select Committee's report what is meant by "contestable search warrants".

I note that the exercise of powers under s 67 of the *Summary Offences Act 1953* (SA) and the issue of warrants under s 31 of the ICAC Act can be and, often enough, are challenged in the course of criminal prosecutions.

My belief is that the use by an ICAC investigator of a s 31 ICAC Act warrant has never been the subject of criticism either by the reviewer or by a court.

Recommendation 8.5

Recommendation 8.5 of the Select Committee is as follows:

> The Committee recommends that the Crime and Public Integrity Policy Committee review the Criminal Investigations Covert Operations Act 2009 to consider strengthening the approval process for undercover operations and to reduce the risk of breaches of section 4(2) of the Act. The Committee also recommends that Crime and Public Integrity Policy Committee review Part 3 of the Police Complaints Disciplinary Act regarding the Management Resolution Process.

I do not wish to say anything in relation to the suggestion that the *Criminal Investigations (Covert Operations) Act 2009* (SA) ought to be reviewed.

I note that other jurisdictions have more comprehensive schemes governing covert or controlled operations.[4] If there is to be a review it may be that the Committee would wish to conduct a comprehensive review rather than the discrete one suggested.

These comments should not be interpreted as my endorsement of the Select Committee's findings about the use of s 4(2) of the *Criminal Investigations (Covert Operations) Act 2009* (SA) in Operation Bandicoot.

[3] The Hon Bruce Lander QC, Transcript of evidence before the Select Committee, 12 November 2021, p.542, p.544 & p.547
[4] For example, the *Law Enforcement (Controlled Operations) Act 1997* (NSW)

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I note that the trial judge, the Honourable Justice Lovell, who considered the matter and had access to all relevant evidence, found that the "errors", as he described them, in obtaining the approvals were "not deliberate nor were they reckless", investigating police were attempting to comply with s 4 and their conduct did not involve any "deliberate cutting of corners". Further, His Honour stated that even if the police had adopted the correct approach "the ambit of the operation could well have remained the same".[5] Accordingly, His Honour found the mistakes made by the officers were not serious enough to require him to exercise his discretion to exclude the evidence.

In relation to the suggested review of Part 3 of the *Police Complaints and Discipline Act 2016* (SA) that Act has been the subject of two recent reviews by my predecessor the Hon Bruce Lander QC and Judge Gordon Barrett QC respectively. Each made recommendations to improve the legislative scheme. To the best of my knowledge, no action has been taken in relation to those reports.

Recommendation 8.6

Recommendation 8.6 of the Select Committee is as follows:

> The Committee recommends that a report be made to the Legislative Council to consider, including but not limited to, Parliamentary Privilege and ICAC, and its view that the actions, or inaction, of any witnesses were unsatisfactory in terms of the Committee discharging the functions assigned by the Legislative Council. The Committee also recommends that the Legislative Council consider appropriate resourcing to assist Committees when inquiring into complex matters.

I do not understand what is meant by the first sentence of this recommendation. The report seems to indicate it relates to the conduct of witnesses before the Select Committee, but I do not understand what is meant by "Parliamentary Privilege and ICAC".

Recommendation 8.7

Recommendation 8.7 of the Select Committee is as follows:

> The Committee recommends that Parliament consider amendments to the ICAC Act that contemplate a publication protocol and exoneration protocol whereby at the conclusion of a investigation and/or prosecution that makes no adverse findings against a person or persons, their names are published in a prominent publication, on annual reports and on the ICAC website attesting to that fact.

In considering this question the Committee is likely to be assisted by the November 2021 report of the NSW Parliament's Committee on the Independent Commission Against Corruption entitled *Reputational impact on an individual being adversely named in the ICAC's investigations.*

In Chapter 4 of that Report the Committee considered whether or not an exoneration protocol ought to be included in the legislation governing the NSW ICAC. The Committee ultimately found at p.36 that "[a]n exoneration protocol is misconceived and would be fundamentally inoperable".

Of course, there is a significant distinction between the powers of the NSW ICAC and the Commission in SA.

The NSW ICAC makes findings of corruption and publishes them in reports accessible to the general public. Even in that legislative context the NSW Committee found that an exoneration protocol was inappropriate.

[5] R v M, I and Ors [2018] SASC 24 at [233], [238] & [244]

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The South Australian Commission makes no findings of corruption. Because of the new restrictions imposed on our public statement and reporting powers, the only time a person is likely to be identified as being the subject of a corruption investigation is where that information emerges during their trial or sentencing. While the person may be found guilty of an offence that falls within the definition of corruption, no "finding" of corruption is made.

This raises the question: what is being exonerated?

If it is the decision to conduct an investigation of the person, to refer them for prosecution or to commence a prosecution which leads to an acquittal, then the question presented is why a person subject to an ordinary police investigation which ends in the same way should not also enjoy an exoneration. Such a person would be in a substantially similar position to a person investigated by the Commission.

An acquittal at trial does not amount to a finding of innocence or a finding that there was no corruption. It merely means that the charges were not proved beyond reasonable doubt. Nor does it mean that the prosecution was ill-advised. In those circumstances a so-called exoneration would be entirely inappropriate. I reiterate, if such a scheme were to be introduced for acquittals following Commission investigations, there is no reason it should not be widened to take in all criminal prosecutions which follow investigations by police. This would be a very unusual and controversial step.

Many investigations by the Commission do not result in a criminal prosecution. For example, the initial allegation may be found to be wrong or unsupported by evidence. In such cases the fact that a person has been the subject of an investigation will not be a matter of public knowledge and may not even be known by the person subject to the allegation. An exoneration protocol that compelled publication of the fact that such a person had been investigated by the Commission would likely have the illogical consequence of causing that person harm, stress and reputational damage.

Indeed, the new obligation in s 39A to inform a person who was subject of an investigation that the matter has been closed has already been seen to cause distress to a person who was otherwise ignorant of the investigation.

<u>Recommendation 8.8</u>

Recommendation 8.8 of the Select Committee is as follows:

> The Committee recommends that Parliament consider amendments to the ICAC Act that prevent joint operations and investigations between SAPOL and ICAC when members of SAPOL are the subject of the investigations. Further, the Committee recommends that Parliament consider the appropriateness of SAPOL investigating its own members for misconduct, maladministration and disciplinary matters.

It is not clear from the report whether this recommendation is suggesting that SAPOL be responsible for all matters where its members are the subject of investigation, or that SAPOL be responsible for none of these investigations.

If the former, I recommend Parliament consider the previous Commissioner's report on his review of the oversight and management of complaints regarding the conduct of members of South Australia Police, and the review of the *Police Complaints and Discipline Act 2016* (SA) conducted by former Judge, Mr Gordon Barrett QC.

Both those reviews considered whether and to what extent SAPOL's handling of complaints about its officers should be the subject of supervision by an independent body. In that pursuit, both reviews widely consulted stakeholders and conducted surveys of police complaint handling in other jurisdictions.

Parliament may be assisted by these reviews and, in particular, the comments made about the importance of independent supervision of police complaint handling and investigation.

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If the recommendation is that responsibility for investigating complaints against police officers be removed from SAPOL, then I would make the following observations.

First, in his review Mr Lander considered, but ultimately rejected, the suggestion that all complaints should be investigated by bodies independent of the police. Instead Mr Lander found that police should investigate most complaints with such investigations being subject to supervision by an independent body. This was the model which was adopted in the *Police Complaints and Discipline Act 2016* (SA). In his review Mr Barrett said he had not seen any evidence which suggested this position should change.

Second, the suggestion that SAPOL should have *less* involvement in the investigation of complaints against police officers is contrary to the recent amendments to the ICAC Act.

As I outlined in my s 42 report, the scope of police conduct the Commission is able to investigate, and its independence in doing so, has been substantially diminished by the amendments. For example, the Commission can no longer investigate allegations that police officers have committed assault or theft, unless the alleged conduct can also fall within the scope of abuse of public office.

The outcome of any Commission investigation, including whether or not a brief will be referred for the Director of Public Prosecutions to consider charges, is now not within the control of the Commission. If the Commission forms the view during an investigation that a police officer has committed a corruption offence it is now specifically prohibited by the ICAC Act from bringing that to the DPP's attention. Rather, the Commission must communicate the evidence to a law enforcement agency which decides whether or not to refer the matter to the DPP. In the case of a SAPOL officer, that law enforcement agency will invariably be SAPOL.

Further, as I discussed in my s 42 report, the narrowed definitions of corruption and misconduct substantially reduce the range of conduct that can be dealt with as such under the Police Complaints Act, and diminish that Act's effectiveness.

If Parliament is intending to review the handling of the police complaints system, I recommend it consider the impact of the recent amendments upon that system, including the manner in which the amendments reduce the scope and effectiveness of the supervision by independent bodies of SAPOL's handling and investigation of police complaints.

Kindly note that in the interests of transparency and the public interest in these matters, I propose to publish a copy of this letter on the Commission's website.

Yours sincerely

The Hon. Ann Vanstone QC
COMMISSIONER

Encl
An examination of the changes effected by the recent amendments to the Independent Commission Against Corruption Act 2012 (SA), a report under s 42 of the ICAC Act.

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